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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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Amendment to the Commission's Rules)
Regarding a Plan for Sharing)
the Costs of Microwave Relocation)

WT Docket No. 95-157
RM-8643

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REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION

January 11, 1996

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EXECUTIVE SUMMARY

The comments filed in this proceeding demonstrate that the only barrier to the rapid deployment of Personal Communications Services ("PCS") is the fair, rapid and efficient relocation of incumbent microwave links that occupy the PCS spectrum. Absent prompt changes in the Commission's rules, the progress already made toward bringing new services to the public may be seriously undermined.

The record in this rulemaking provides a clear path to removing the existing roadblocks to PCS deployment while ensuring equitable treatment of all concerned. Three basic actions are needed and needed now. First, cost sharing rules should be immediately adopted. Second, PCIA should be named to serve as the cost sharing clearinghouse. Third, the microwave relocation rules must be revisited to eliminate abuses and to ensure a fair framework for the timely advent of important new PCS services consistent with the legitimate interests of microwave incumbents.

Despite the contentious and sometimes conflicting interests of the many interested parties to this proceeding, there is virtually unanimous endorsement from all quarters (microwave incumbents, C Block applicants, and A and B Block licensees) that the proposed cost sharing plan can and will benefit the public. In adopting cost sharing rules, however, the Commission should make the several fine tuning adjustments suggested by PCIA in order to ensure that its plan will fully realize the expected industry and public benefits.

In its pleadings before the Commission, PCIA has documented its credentials and willingness to serve as the clearinghouse for administering the cost sharing mechanism. To date, no other organization has expressed a willingness or interest in

assuming those burdens. Accordingly, the Commission can and should name PCIA as the designated cost sharing clearinghouse subject to the submission for public comment and agency review of its implementation plan.

Finally, but equally important, the record in the rulemaking documents in exhaustive detail that abuses of the FCC's microwave relocation rules are occurring. The scope and extent of the ongoing problems compels a conclusion that the voluntary relocation period established under the existing rules is not working and should be scrapped in favor of a simple one-year transition period following direct notice to a microwave incumbent of a desire to relocate its facilities. Other modifications proposed by the Commission in its Notice will also help to discourage misuses of agency policies while ensuring that incumbent microwave licensees continue to enjoy full cost compensation and comparable new facilities with no disruptions to their communications networks.

PCIA appreciates the Commission's initiatives and applauds its efforts to act expeditiously. With the conclusion of the reply round in this rulemaking, the FCC is now in a position to adopt important and timely rule improvements that will achieve the Agency's goals and serve the public interest.

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**REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA") hereby submits its reply to comments filed in the above captioned rulemaking proceeding.¹ As detailed below, the record before the Commission provides compelling evidence that three basic actions are essential to the fair, efficient and timely relocation of microwave links to clear spectrum for important new PCS services. First, the comments offer virtually unanimous support for adoption of the proposed cost sharing rules, subject to a number of thoughtful modifications. Second, there is equally broad-based support for establishing a cost sharing clearinghouse, and PCIA is ready, willing, and able to perform that function. Finally, the comments document in compelling and striking detail that changes in the microwave relocation rules are essential to discourage misuses of agency policies and prevent unwarranted delays in the advent of new services to the public.

¹ Notice of Proposed Rulemaking, WT Docket No. 95-157 (Oct. 12, 1995)(hereinafter "Notice"). All comments cited herein refer to those filed on November 30, 1995 in response to the Notice, unless otherwise specified. Reply comments in this proceeding were due December 21, 1995. Because the Commission was closed on that date, this reply is being submitted on the first day the Commission is open following the budgetary shutdown.

I. INTRODUCTION AND SUMMARY

The FCC's vision of Personal Communications Services stands on the verge of becoming a reality. A barrier to its realization is the fair, rapid and efficient relocation of incumbent microwave links that now occupy the PCS spectrum. Unfortunately, absent prompt changes in the Commission's rules, the ongoing progress toward bringing these valuable new services to market may be arrested, to the public's serious detriment.

The record in this rulemaking establishes a clear path to removing current roadblocks while ensuring equitable treatment of all concerned. Three basic actions are needed and needed now. First, cost sharing rules should be adopted immediately. Second, PCIA should be named to serve as the cost sharing clearinghouse. Third, the microwave relocation rules must be revisited to mitigate abuses and ensure a fair framework for the timely advent of innovative PCS services consistent with the legitimate interests of microwave incumbents.

Cost Sharing Rules Should Be Adopted Now. Despite the contentious and sometimes conflicting interests of the numerous different parties to this proceeding, there is virtually unanimous agreement from all quarters that the proposed cost sharing plan can and will benefit the public. Incumbent microwave operators see benefits from increased incentives by PCS licensees to move entire microwave networks rather than individual microwave links. Potential C Block licensees see benefits in clearing their bands faster and in an installment payment plan that recognizes their limited access to

capital. Existing A and B Block licensees know from their first-hand experience that cost sharing will facilitate faster and more efficient clearing of spectrum for their services than is otherwise possible.

In adopting cost sharing rules, however, the comments before the Commission highlight several areas where fine tuning of the plan would be beneficial. Specifically, PCIA suggests the following modifications to the proposal in the Notice:

- The costs of tower modifications as well as tower construction should be included in the separate \$150,000 per link tower cost cap.
- The costs of analog to digital conversions during the voluntary negotiation period, subject to the \$250,000 cap, should be deemed reimbursable cost sharing expenses. During the mandatory period, such costs would not be reimbursable.
- In the cost sharing formula, T_1 should be the date of relocation as determined in the relocation agreement, rather than a uniform date for all relocators.
- T_N , the date subsequent PCS providers enter the market, should be calculated by adding two months to the PCN date.
- To determine cost sharing obligations, PCIA supports the use of the Proximity Threshold suggested by several commenters rather than TIA Bulletin 10F.

Virtually all parties also recognize the need for a clearinghouse to handle the administrative details of implementing the cost sharing plan. PCIA has documented its credentials and willingness to serve that function on behalf of PCS licensees. No other organization has expressed a willingness or interest in assuming those burdens. Accordingly, the Commission can and should name PCIA as the designated cost

sharing clearinghouse subject to the submission of its implementation plan for public comment and agency review.

Last, but not least, the record in the rulemaking documents in exhaustive detail that abuses of the FCC's microwave relocation rules are occurring. An extensive review of specific problems brought to PCIA's attention are set forth in Appendix A to these reply comments. The scope and extent of these ongoing problems compels a conclusion that the voluntary relocation period concept in the existing rules is not working and should be replaced by a simple one year transition period. This would prevent misuses of agency policies while ensuring that incumbent microwave licensees continue to enjoy full cost compensation and comparable new facilities with no disruptions to their communications networks. PCIA fears that as long as there is a voluntary negotiation period, the abuses will continue.

In addition to the elimination of the voluntary transition period, the PCS commenters share PCIA's fundamental view that the following changes are essential to achieving the Commission's goals for PCS:

- Good faith negotiations during the mandatory period should be defined as an offer by a PCS provider and acceptance by an incumbent of comparable facilities.
- Incumbents who are found not to have bargained in good faith with a PCS provider should be entitled only to a cash payment in an amount not to exceed the greater of the independent appraisals, and the incumbent's system should be converted to secondary status in ninety days.
- The definition of comparable facilities should be based on technical factors which can be objectively measured such that, for example, a system comparable to a 2 GHz analog system could be a 6 GHz analog system.

- Comparable facilities should be limited to the actual costs of relocation and should not include consultant or legal fees not authorized by the PCS provider.
- Parties unable to conclude negotiations within one year after the start of the voluntary negotiation period (if the Commission maintains voluntary periods) should be required to file two independent cost estimates of a comparable system with the FCC to help resolve differences.
- PCS providers should only be required to relocate links which would suffer interference from their PCS operations.
- The FCC should not allow any additional primary or secondary licensing of microwave operations in the 2 GHz band.
- PCS providers should be permitted to initiate the voluntary relocation period (if it is maintained) for incumbents outside the A and B Blocks by sending a letter that notifies them of the PCS provider's desire to begin relocation negotiations.
- At the start of the twelve-month test period, an incumbent's authorization should return to the FCC, and at the end of the twelve-month test period, the FCC should make an announcement that the license has been terminated.
- Incumbents who elect to relocate their own systems in exchange for a cash payment should not be entitled to the twelve-month test period because the PCS provider will have no input into the construction of the relocated link and will be unable to resolve any difficulties. Other incumbents should be permitted to waive the test period by contract.
- PCS providers should not be required to hold a relocated incumbent's spectrum in reserve, but rather should be required to guarantee the incumbent a comparable replacement system. Holding such spectrum in reserve will delay the deployment of PCS systems for at least a full year.
- Incumbents should be required to verify their public safety status to PCS providers if they want to take advantage of the extended negotiation periods. In addition, the definition of public safety entities entitled to extended relocation schedules should be limited to those cases where substantially all of a licensee's communications are related to the protection of life and property.

- PCIA also supports converting to secondary status all incumbent microwave operations remaining in the 2 GHz band as of April 4, 2005. Ten years is sufficient time for all links to be relocated, and PCS operations should then have free use of the band.

As detailed below, PCIA believes that the FCC's proposals in this proceeding provide a sound foundation for facilitating the advent of PCS services. PCIA appreciates the agency's initiatives and applauds its efforts to act expeditiously. With the conclusion of the reply round in this rulemaking, the Commission is now in a position to adopt important and timely rule improvements that will achieve the agency's goals and serve the public interest.

II. The Commission's Cost Sharing Proposal Has Broad Support in the Record

Notwithstanding the diverse interests and agendas of the numerous commenters, the Commission's proposals have received remarkably broad support from all interested parties. Microwave incumbents expressed consistent support for cost sharing as an important aid in equitable and rapid relocation of their systems.² Potential C Block

² Comments of American Petroleum Institute at 5 ("API"); Comments of Association of Public-Safety Communications Officials-International, Inc. at 13 ("APCO"); Comments of Central Iowa Power Cooperative at 1 ("CIPCO"); Comments of the Los Angeles County Sheriff's Department at 2 ("L.A. County"); Comments of Maine Microwave Associates at 2 ("Maine Microwave"); Comments of the City of San Diego, California at 4 ("San Diego"); Comments of East River Electric Power Cooperative at 2; Comments of the Industrial Telecommunications Association at 6 ("ITA"); Comments of Interstate Natural Gas Association of America at 2; Comments of National Rural Electric Cooperative Association at 4; Comments of Southern California Gas Company at 3 ("SoCal"); Comments of the Telecommunications

(continued...)

licensees see the cost sharing proposal as alleviating the head start current licensees obtained as a result of judicial intervention in the current process. PCS A and B Block licensees join PCIA in endorsing cost sharing as essential to a rapid and equitable clearing of the band for new services. Therefore, the comments show a clear consensus by all concerned that the general goals of fairness and rapid deployment are furthered by a cost sharing plan.

Microwave incumbents are particularly encouraged by cost sharing's ability to facilitate network relocations rather than the incremental relocation of individual links.³ Broader relocation plans facilitated by cost sharing have the ability to greatly reduce transaction costs among PCS licensees and incumbents and in many cases will help incumbents eliminate "the need to reach separate agreements with each PCS licensee" ⁴ Commenters observed that piecemeal relocations could drive up the costs of relocation, needlessly divert the attention of microwave incumbents'

²(...continued)

Industry Association at 2, 8; Comments of Tenneco Energy at 2; Comments of The Southern Company at 3 ("Southern"); Comments of UTC, the Telecommunications Association at 5, 6 ("UTC"); Comments of Valero Transmission, L.P. at 2 ("Valero"); Comments of Williams Wireless, Inc. at 2 ("WWI").

³ CIPCO at 1; L.A. County at 2; Maine Microwave at 2; San Diego at 3; ITA at 7; Valero at 2; WWI at 3; SoCal at 3; Southern at 7; UTC at 5-6. Support for cost-sharing as a method for encouraging network relocations was not limited to incumbents. See Comments of Omnipoint Communications, Inc. at 2 ("Omnipoint"); Comments of BellSouth Corporation at 5 ("BellSouth"); Comments of Sprint Telecommunications Venture at 23 ("Sprint"); Comments of UTAM, Inc. at 2 ("UTAM").

⁴ APCO at 13.

management,⁵ and create "an overly complex mosaic of hybrid technology which would increase points of failure and decrease reliability and efficacy of the operation of the system."⁶ In contrast, the adoption of a cost sharing plan will allow PCS relocators to work with incumbents to accomplish in many cases the goal of relocation of a network rather than an individual link.⁷

Potential C Block licensees also consistently support the concept of cost sharing.⁸ They expect cost sharing to expedite deployment of PCS, particularly in the C Block, and to assist in reducing the head start enjoyed by A and B Block licensees.⁹ The formula proposed by the Commission, including a cap on per link relocation reimbursement expenses, likewise won support from potential C Block licensees as a fair and equitable method for cost sharing,¹⁰ as did the cost sharing plan's efforts to ease the burden on C Block applicants and entrepreneurs through deferred payments.

⁵ SoCal at 3-4.

⁶ WWI at 4; See UTC at 6; Southern at 7.

⁷ Although PCIA's members are committed to working with incumbents to accommodate their desires for network relocations, PCIA believes that in many cases, network relocation will not be possible, and thus the FCC's clarification that PCS licensees are only required to relocate links which would suffer interference is critical to the successful deployment of PCS. See Notice at ¶ 76.

⁸ Comments of Carolina PCS I Limited Partnership at 1; Comments of DCR Communications, Inc. at 2 ("DCR"); Comments of GO Communications Corporation at 2 ("GO"); Comments of U.S. Airwaves at 1 ("U.S. Airwaves"); Omnipoint at i, 1.

⁹ DCR at 2, 3; Omnipoint at 1.

¹⁰ Omnipoint at 1; U.S. Airwaves at 2.

The installment plan proposed in the Notice permits entrepreneur licensees to commit "their limited resources toward building and starting up their new systems."¹¹

"Allowing small businesses an installment payment plan [will also strengthen] the Commission's overarching policy commitment, set forth by Congress, to foster legitimate and lasting small business participation in PCS."¹²

Current PCS licensees strongly endorsed cost sharing for many of the reasons identified by PCIA in its comments. A number of commenters noted that cost sharing is a necessary mechanism that aids all parties and helps to "promote the equitable relocation of microwave systems and the rapid deployment of PCS."¹³ Moreover, cost sharing advances the public interest by eliminating "free riders" and creating incentives for the rapid, ubiquitous, and competitive availability of PCS.¹⁴ Without cost sharing, many PCS entities could have incentives to delay PCS deployment.¹⁵

Finally, to address concerns of A and B Block licensees who have reached private cost sharing agreements, the Commission should continue to permit private

¹¹ DCR at 9; see also GO at 5; Omnipoint at 2; U.S. Airwaves at 7. Installment payments also received support from A and B Block licensees as well. Sprint at 30; Comments of Pacific Bell Mobile Services at 5 ("PacBell").

¹² Omnipoint at 8.

¹³ Comments of AT&T Wireless Services, Inc. at 1-2 ("AT&T"); see also Comments of GTE Service Corporation at 2 ("GTE"); PacBell at 1; UTAM at 2; Comments of the Cellular Telecommunications Industry Association at 5-6 ("CTIA"); Sprint at 28.

¹⁴ BellSouth at 2; Sprint at 24.

¹⁵ BellSouth at 2.

parties to reach their own cost sharing arrangements. Specifically, the FCC should "take no action that would prohibit private agreements, where they exist, from governing the cost sharing obligations among parties to such agreements."¹⁶ PCIA believes that incorporating such flexibility in the rules will encourage parties to enter into private agreements that will promote more efficient relocation and cost sharing efforts.

III. The Clearinghouse Proposal Was Strongly Endorsed by Commenters

PCIA's proposal to create a not-for-profit clearinghouse to handle the administrative duties associated with cost sharing also received broad industry support.¹⁷ As noted in its comments, PCIA is uniquely well-positioned to serve the industry clearinghouse function. Years of service to the mobile industry, direct involvement in the development of the proposals that provided the basis for this rulemaking, and extensive experience with database requirements make PCIA the natural choice. PCIA's position as the largest industry trade group insulates PCIA from pressure from any individual entity, enabling PCIA to administer the Commission's cost sharing plan in a neutral fashion, a critical element of any

¹⁶ GTE at 3; see also PacBell at 6; CTIA at 6-7; AT&T at 6.

¹⁷ API at 11; BellSouth at 14; GO at 3 n.6; GTE at 12; Comments of PCS PrimeCo, L.P. at 11 ("PCS PrimeCo"); Comments of SouthWestern Bell Mobile Systems, Inc. at 8 ("SBMS"); Sprint at 30; Southern at 11; U.S. Airwaves at 6; UTC at 15; CTIA at 6

clearinghouse proposal.¹⁸ PCIA's existing infrastructure also permits PCIA to begin operation of the clearinghouse function in a short time frame.¹⁹

The few questions raised about the clearinghouse do not present substantial impediments to its establishment. For example, several commenters expressed concerns about potential confidentiality problems associated with a clearinghouse.²⁰ PCIA agrees that it is critically important that the clearinghouse be administered in such a way that confidentiality is guaranteed, but submits that this can be assured. To this end, PCIA endorses the position that actual cost sharing and relocation agreements would not have to be filed with the clearinghouse; only the relevant summary data would be submitted with declarations warranting the validity of the information.

While PCIA's clearinghouse proposal can be implemented immediately, some commenters argue that the clearinghouse function should be competitively bid or performed by an entity from outside the PCS industry.²¹ It is evident, however, that a bidding process could indefinitely delay the implementation of a cost sharing plan

¹⁸ GO at 3 n.6; API at 11; BellSouth at 15.

¹⁹ See BellSouth at 15 (expressing belief that clearinghouse must be able to be up and running within 90 days).

²⁰ See Comments of Association of American Railroads at 13; BellSouth at 15; SoCal at 10-11; Southern at 11; UTC at 17; CTIA at 7 n. 11. Not all commenters agreed. At least two felt confidentiality would be a minimal concern. SBMS at 8-9; Comments of Western Wireless Corporation at 10 ("Western").

²¹ ITA at 8; Southern at 11; UTC at 16.

without any tangible benefit to the industry. Time is already short for A and B Block licensees and C Block bidders, and further delays should not be countenanced.

Similarly, designating a party completely unfamiliar with PCS as the clearinghouse would waste the wealth of experience, knowledge and infrastructure available at PCIA. The Commission should not reinvent the wheel. PCIA is ready and able to assume this responsibility and to move forward with implementation of the measures required to facilitate the band clearing process.

* * * *

In sum, in a contentious and emerging field, a remarkable consensus has developed regarding the need for the Commission to adopt a cost sharing proposal that speeds deployment of PCS and encourages a smooth transition for incumbent microwave operators. Accordingly, the FCC should move forward quickly to make that consensus a reality in its PCS rules.

IV. PCIA Supports a Number of Useful Modifications to the Proposed Cost Sharing Rules

Based on its own analysis and review of the comments submitted by other parties, PCIA believes that a number of modifications to the Commission's cost sharing proposals are necessary to achieve the full benefits of such a plan. First, the rules specifying the cap and the costs eligible for sharing should be adjusted to take into account tower modification and certain other relocation requirements. Second, PCIA supports clarifying the Commission's depreciation formula to more equitably account

for timing issues. Finally, as suggested by a number of the largest PCS licensees, the interference/benefit test for cost sharing purposes should be applied based on a bright-line proximity basis.

A. The Reimbursement Cap and Rules Require Clarification

PCIA supports two modifications to the Commission's cap proposal. First, PCIA supports BellSouth's proposal that the costs of tower modifications as well as tower construction be included in the separate \$150,000 per link tower cost cap.²² The aging towers of many incumbent microwave operators require significant investment before they can accommodate replacement facilities. Without this modification, PCIA shares BellSouth's concerns that, as currently structured, the proposed caps would create a perverse incentive to needlessly construct new towers and further delay deployment of PCS.

Second, in order to further encourage PCS and microwave licensees to conclude timely agreements, PCIA supports the proposal to permit cost sharing obligations to attach to the costs of analog to digital conversions during the voluntary negotiation period, subject to the \$250,000 cap.²³ Making such costs eligible for reimbursement will expedite relocations as long as the replacement of analog equipment with a digital

²² BellSouth at 19.

²³ BellSouth at 13.

system remains non-reimbursable during the mandatory period, if there is a reasonable, comparable analog solution.²⁴

B. Two of the Variables in the Cost Sharing Formula Require Clear Definitions

PCIA also supports clarifications to factors in the cost sharing formula. First, T_1 should be the date of relocation as determined in the relocation agreement rather than a uniform date for all relocators, as explained in PCIA's comments. There can be no justification for use of such a rough approximation when the data is readily available and use of the actual data will ensure a more equitable reimbursement. Because some links may not be relocated for years, an assumption of a uniform date would ignore reality and deny PCS providers undertaking later relocations their appropriate reimbursement.

Second, T_N , the date subsequent PCS providers enter the market, should be calculated by adding two months to the PCN date. This would provide for a clear date that roughly approximates the date on which the PCS provider's system will begin operating. Adoption of both of these definitions will lend clarity and predictability to reimbursement calculations and provide incentives for cost sharing parties to perform their relocations efficiently and on-time.

²⁴ Nonetheless, PCIA still firmly believes that to prevent unwarranted delays in PCS deployment, the FCC should eliminate the voluntary negotiation period altogether in order to provide real incentives for good faith bargaining at the outset.

C. PCIA Supports Use of the Proximity Threshold To Determine Interference

As a result of discussions with the PCS licensees supporting the use of the Proximity Threshold and an evaluation of their proposals, PCIA has become convinced that the Proximity Threshold creates an appropriately configured and clear interference/benefit rule that will facilitate the cost sharing process.²⁵ Under the Proximity Threshold proposal, a cost sharing obligation would be triggered if, for any microwave link:

- all or part of the link is co-channel (i.e. co-block) with the subsequent PCS licensee's authorized frequencies,
- the relocation costs have been paid by a PCS licensee,
- two months after the subsequent licensee issues a PCN for a base station that is located within a rectangle described as follows: the length, x , of the rectangle shall be a line extending through both nodes of the microwave link to 30 miles beyond each node; the width of the rectangle shall be a line perpendicular to x and extending for 15 miles on each side of x .

These parameters provide for a rough approximation of the average PCS system's interference zone over average terrain. Unlike other more complicated interference calculations, the Proximity Threshold should reduce any disagreements about interference by creating a "bright-line" rule that is not based on equations which could

²⁵ See GTE at 5-6; AT&T at 7-9; PCS PrimeCo at 12-13.

have potentially varying inputs and results.²⁶ Thus, this formulation will simplify the parties' and the Commission's burdens.

The Proximity Threshold is responsive to the FCC's request for an interference determination mechanism that will minimize disputes while ensuring a fair allocation of costs among benefitted parties. The Proximity Threshold will include under cost sharing obligations the vast majority of those PCS licensees whose systems would have caused interference to the relocated incumbent. Although, in a few cases, it is possible that a PCS licensee whose system may or may not have caused interference may be incorrectly classified by the Threshold calculation, this result cannot be avoided if a simplified interference model is used. Moreover, PCIA is confident that the proposed parameters for the box have been established on the basis of sound radio engineering principles in order to minimize these instances, and understands that some of its members will be including detailed studies in their reply comments to verify this approach's validity.

Despite the obvious advantages of a clear and certain interference model such as the Proximity Threshold, a few commenters argue that cost sharing should take into account a licensee's ability to "engineer around" an incumbent.²⁷ Although it is possible in some cases for a PCS licensee to avoid interference with a co-channel

²⁶ AT&T at 8.

²⁷ BellSouth at 6-9; DCR at 6-7; GO at 6-7; Comments of the Personal Communications Industry Association at 30-32 ("PCIA"); SBMS at 7.

incumbent for some period of time, such circumstances are likely to arise in very few cases and to continue only for relatively short periods. As the Commission has observed, spectrum sharing will only be successful in the short term.²⁸ Once large numbers of customers are using a PCS system, operating without causing some interference to incumbents will become impossible. Indeed, PCS licensees in the D, E, and F Blocks will likely lack any ability to work around an incumbent even initially given their smaller frequency assignments. Thus, although there may be a few instances in which the Proximity Threshold will not be as accurate as TIA Bulletin 10F, the simplicity of the Proximity Threshold will make up for these difficulties by minimizing disputes and increasing efficiency.

D. UTAM's Proposed Trigger For its Cost Sharing Obligations Is Fair, but the FCC's Installment Payment Proposal for UTAM Should Be Shortened

The trigger mechanism proposed by UTAM appears to be consistent with the spirit of the PCIA cost sharing plan. However, certain safeguards are required to ensure timely notification to the clearinghouse of the trigger events. This should be accomplished by providing the clearinghouse with all PCNs and public notices released by UTAM.

²⁸ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Second Memorandum Opinion and Order, 9 FCC Rcd 7797, 7801 (1994); Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 7794, 7798 n.9 (1992), aff'd Adams Telcom, Inc. v. FCC, 38 F.3d 576 (D.C. Cir. 1994).

The trigger mechanism will be valid until one year before the sunset of the clearinghouse at which time UTAM will be responsible for cost sharing on all outstanding obligations. Also, UTAM will be obligated to cost share on any links relocated during the final year. Payments will be provided via the agreed upon payment plan defined in the FCC's rules.

PCIA has consistently supported an installment payment plan for UTAM. However, PCIA maintains its position that UTAM should not be afforded the same benefits as the PCS entrepreneurs. A shorter period would be appropriate.

V. THE TRANSITION RULE MODIFICATIONS SUPPORTED BY PCIA, INCLUDING RECONSIDERATION OF THE VOLUNTARY NEGOTIATION PERIOD, ARE NECESSARY TO END ABUSES OF THE NEGOTIATION PROCESS

Because of the significant abuses of the current transition rules by some incumbents, PCIA supports the Commission's proposals to modify the transition rules and facilitate negotiations. However, PCIA and numerous other commenters fear that, without reconsideration of the voluntary negotiation period, the continuing exorbitant compensation demands by incumbents will remain as impediments to PCS licensees who are conscientiously trying to relocate incumbents to comparable facilities and will prevent the deployment PCS systems.

A. The Comments Demonstrate the Critical Need for FCC Action Against Incumbent Abuses, Including Reconsideration of the Voluntary Negotiation Period

In its comments, PCIA documented numerous abuses of the transition rules by unscrupulous incumbents. Individual PCS licensees and CTIA included additional evidence of these problems in their filings. These case studies are collected in Appendix A attached hereto. Based on this evidence, the FCC must not only adopt the transition rule modifications it has proposed, but also should jettison the voluntary transition period.

The voluntary negotiation period has been used by incumbents to take advantage of PCS providers. Incumbents are guaranteed a comparable system and a seamless transition to the new facilities at all phases of the negotiation process. The voluntary negotiation period merely provides leverage for their demands for unwarranted premiums from PCS providers. PCS licensees simply cannot afford to wait two years to begin the relocations necessary to deploy PCS services, and neither can the public. It is, therefore, not surprising that many of the PCS providers commenting in this proceeding support a reconsideration of the voluntary period because of the severe problems the transition rules have spawned.²⁹

In response to these serious concerns, PCIA has proposed that the Commission give all incumbents a one-year mandatory negotiation period to be initiated by

²⁹ AT&T at 15-16; GO at 7-9; Comments of Intercel, Inc. at 4; PacBell at 8-9; PCS Primeco at 16; PCIA at 11-15; SBMS at 2-3; Sprint at 10; Western at 11-13.

notification by the PCS provider that it wishes to begin negotiations. This requirement would fully protect incumbents, who would still enjoy a full year period in which to negotiate as well as the continuing guarantee of a comparable system. Those incumbents who are not now attempting to take advantage of the FCC's rules will not be prejudiced in any way, while those who are trying to extract unwarranted premiums will be forced to negotiate for and relocate to a comparable system within a reasonable time period, as the FCC anticipated when it promulgated the current rules.³⁰ Because of the importance of this issue to the future of PCS, PCIA urges the Commission to give it prompt and serious consideration at this time. If the voluntary negotiation period is not eliminated, PCIA and its members fear that the deployment of PCS will be significantly delayed, with serious consequences for both the public and the industry. The agency is not powerless where its public policy goals are being frustrated by private parties.

B. The FCC, PCIA, and Other Commenters Have Proposed A Number of Actions That Are Critical To Minimizing Future Abuses and Improving the Transition Rules

In its comments, PCIA supported the majority of the FCC's proposals to modify the transition rules and provided some additional recommendations. In addition to reconsideration of the voluntary negotiation period, PCIA urges the FCC to adopt the

³⁰ At a minimum, the Commission should consider extending the good faith negotiation requirement to the voluntary period, which would give incumbents three years to negotiate but require them to bargain in good faith.

following proposals supported by PCIA and numerous other commenters to improve the relocation rules.

- Good faith negotiations during the mandatory period should be defined as an offer by a PCS provider and acceptance by an incumbent of comparable facilities.
- Incumbents who are found not to have bargained in good faith with a PCS provider should only be entitled to a cash payment in an amount not to exceed the greater of the independent appraisals, and the incumbent's system should be converted to secondary status in ninety days.
- The definition of comparable facilities should be based on technical factors which can be objectively measured, such that, for example, a system comparable to a 2 GHz analog system could be a 6 GHz analog system.
- Comparable facilities should be limited to the actual costs of relocation and should not include consultant or legal fees not authorized by the PCS provider.
- Parties unable to conclude negotiations within one year after the start of the voluntary negotiation period (if the Commission maintains voluntary periods) should be required to file two independent cost estimates of a comparable system with the FCC to help resolve differences.
- PCS providers are only required to relocate links which would suffer interference from their PCS operations.
- The FCC should not allow any additional primary or secondary licensing of microwave operations in the 2 GHz band.
- PCS providers should be permitted to initiate the voluntary relocation period (if it is maintained) for incumbents outside the A and B Blocks by sending a letter that notifies them of the PCS provider's desire to begin relocation negotiations.
- At the start of the twelve-month test period, an incumbent's authorization should return to the FCC, and at the end of the twelve-month test period, the FCC should make an announcement that the license has been terminated.
- Incumbents who choose to relocate their own systems in exchange for a cash payment should not be entitled to the twelve-month test period since the PCS provider will have no input into the construction of the relocated link and will